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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

ANGELO PASSINI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Angelo Passini, respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit, entered on August 10, 1966.

JUDGMENT AND OPINION OF THE COURT BELOW

On August 10, 1966, the United States Court of Appeals for the Seventh Circuit affirmed a judgment of conviction entered in the United States District Court for the North-

ern District of Illinois, Eastern Division, sentencing petitioner to imprisonment for a term of five years. No opinion was rendered by the District Court. The Opinion of the Court of Appeals has not yet been reported, but is reprinted herewith as Appendix A.

JURISDICTIONAL STATEMENT

On a jury trial in United States District Court, Petitioner was convicted of conspiracy relative to traffic in illegal narcotics, in violation of Title 21 U.S. Code, Section 174.

On appeal to the United States Court of Appeals for the Seventh Circuit, the judgment of conviction was affirmed in an opinion filed August 10, 1966.

A petition for rehearing was timely filed, and was denied on September 15, 1966.

The jurisdiction of this Court is invoked under the provisions of Title 18 United States Code, Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Where defense counsel in a federal criminal trial becomes ill and temporarily unable to continue once trial has commenced,

A. May the trial proceed in his absence?

B. May evidence received during the absence of counsel, be considered against the defendant?

C. May the defendant be required to represent himself, where he obviously lacks any training or experience in legal matters?

2. Where evidence is received in a federal criminal trial in the absence of the attorney for the defendant, and the trial court refuses to exclude that evidence on subsequent motion,

A. Is prejudice to the defendant conclusively presumed?

B. If not, where does the burden lie to establish presence or absence of prejudice, and what showing need be made?

3. With respect to the right to counsel, can any distinction properly be made between a multiple prosecution and the prosecution of a single individual? If so, what is the basis of that distinction?

4. Does the Sixth Amendment guarantee of "assistance of counsel" contemplate only representation, or does it also encompass the right to consultation?

5. If a federal criminal defendant can be compelled, against his will, to act as his own lawyer, then,

(a) What are the minimum standards of courtesy that must be extended to such a defendant?

(b) Can he be required to be seated at a place where he is unable to hear the testimony?

(c) Can he be threatened with revocation of bail as punishment for making motions more frequently than the trial judge deems proper?

6. Is a charge of criminal conspiracy proved by evidence that the defendant offered to help the conspirators, but that his offer was rejected by them?

7. Where the record clearly establishes the probable innocence of a convicted defendant, is a reviewing court bound by the jury's verdict of guilty to the point where it must,

A. Disregard the cross-examination of the very witness whose direct examination is cited to support the verdict? and,

B. Accept uncritically, testimony of supposed events which, beyond any doubt, would have been physically impossible?

RELEVANT STATUTE AND CONSTITUTIONAL PROVISION

Title 21 U.S. Code, Section 174, provides, in relevant part:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States . . . or receives, conceals, buys, sells, or in any manner facilitates the transportation . . . of any such narcotic drug . . . knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years. . . .

The Sixth Amendment to the Constitution of the United States provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right: . . . to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Within this presentation, reference will be had to two printed records filed in the Court of Appeals. Nine copies of each document have been filed with this Court. The first is the "Joint Appendix" filed on behalf of all appellants in the Court of Appeals. It will be referred to by the designation "(J.A. ——)". The second is a short supplemental appendix filed in the Court of Appeals on behalf of Petitioner Passini, reference whereto will be made by the designation "(P.A. .....)".

Consideration of this Petition does not require a detailed examination of the evidence introduced at the trial. It is sufficient to note that by the testimony of thirty-seven witnesses (J.A. iii-viii), the government sought to prove the allegations of a 40-count indictment against twenty-two defendants (J.A. 9-31). The evidence tended to show numerous sales of narcotics to government witnesses in and out of the presence of surveilling agents by defendants other than petitioner, between 1960 and 1963. Typical evidence, was the testimony of an agent who had hidden in the trunk of a car and heard negotiations leading to the illegal transfer of narcotics (J.A. 80-82). Equally illustrative, was the testimony of a narcotics addict to her meetings and discussions with numerous defendants in the course of obtaining the drugs she needed (J.A. 173-176). The evidenciary pictured culminated in an account of a wild running gun battle between an agent and a narcotics offender, who was killed in the fight (J.A. 323-325). (Petitioner was not a participant in any of those events. Neither the witnesses nor the principals in the cited incidents, were shown to be acquainted with petitioner Passini.)

Petitioner's contentions relate to two propositions: First, that he was denied his right to counsel at his trial; and secondly, that his conviction without substantial evidence of guilt, is a product of misapplication of the law of conspiracy and constitutes denial of due process of law.

In the interests of orderly presentation, the facts material to a consideration of each of these claims will be set forth separately.

THE REPRESENTATION OF PETITIONER

Petitioner appeared for trial with counsel of his selection, Mr. Lewis. He obtained leave to act "as co-counsel for himself" (J.A. 4), but it was clearly understood that this request did not excuse the presence of his attorney at all times (J.A. 98, 100, 112, 121). Petitioner has only a limited education, and no experience with legal procedures. (J.A. 101, 117, 383)

In the course of the direct examination of the government's third witness, and at a time when no witness had yet mentioned Petitioner, Mr. Lewis asked that he be excused briefly. It later appeared that his request had been occasioned by the fact that he was not feeling well, but felt he would be all right if he got a little air. (J.A. 76) In making his request, Petitioner's counsel stated that he knew what the immediately ensuing portions of the witness' testimony would be; that Mr. McDonnell, counsel for another defendant, had agreed to act for petitioner if necessary; and that his absence would be brief. His request was granted, with Petitioner's approval. (J.A. 69)

Later that afternoon, the Court was advised that Mr. Lewis had been taken to the hospital, suffering from an apparent mild heart attack (J.A. 76). Petitioner stated that he had agreed to the absence of his counsel only for

a short period. After further colloquy, he agreed to permit Mr. McDonnell to represent him for the remainder of the day, but stated that if his lawyer were not present on the following day, "I feel that I should have the proper representation." (J.A. 77)

The Court replied that tomorrow was another day, and "we will cross bridges as we come to them." It was agreed that both government counsel and Petitioner would attempt to determine the seriousness of counsel's illness. The Court instructed: "Make your inquiry, and be prepared to look for additional counsel tomorrow." (J.A. 77, 78)

The next day, both Petitioner and government counsel stated that Mr. Lewis was unable to continue. Petitioner stated that he did not want to be represented by other counsel in the case because "they have other clients and I don't feel that I would be getting proper representation." He asked "for a continuance or a separate trial." (J.A. 98, 99)

Government counsel objected that "If he wants to hire additional counsel to help him in the trial, he had yesterday to do it." However, the government had no objection to a recess for the purpose of retaining counsel (J.A. 99).

However, the trial judge held that there was no conflict of interest between Petitioner and any other defendant who was charged only in the conspiracy count. He designated Mr. McDonnell, who represented clients also charged in four substantive counts, to represent Petitioner pending retention of other counsel (J.A. 100)

Petitioner said he did not want to be represented by any other lawyer in the case, and asked for "some time to get a lawyer." The court directed that he be seated and represent himself. (A. 100, 101)

Petitioner objected that he was unable to represent himself; that he wanted his lawyer; that he had only two years of high school, and that "I feel that I am entitled to some sort of representation of my own choice." (J.A. 101)

He asked for permission to make a statement to the jury when it returned to the courtroom. He was directed to sit down "and conduct yourself as an individual here and as a defendant." (J.A. 102)

Petitioner asked if he might ask a question. The court directed the marshal to force him to sit down.

Other counsel in the case suggested a recess to enable them to consult with Petitioner. The court consented, "but he is not going to run the court. Do you understand?" (J.A. 103)

Following the conference, court reconvened and Petitioner consented that Mr. McDonnell might represent him for the balance of that day. (J.A. 103)

The next morning, Petitioner stated that he had consulted with three lawyers between court sessions, but that they had all been unable to enter the case because of other commitments. He stated that he had accepted representation by Mr. McDonnell although he did not really want it, and against his better judgment, "and I'd like to have my attorney with me, because I am afraid." (J.A. 112-113) The court denied this "motion", and directed that Petitioner represent himself. He excused Mr. McDonnell from further responsibility for protecting Petitioner, and ruled that "No one else has that obligation". (J.A. 114)

Shortly thereafter, Petitioner objected to a question asked by a defense lawyer on cross-examination, stating "These people are all strangers to me." The court denied

the objection and admonished the defendant that he had been told "to make no demonstrations before the jury." (J.A. 115)

At the conclusion of the witness' testimony, government counsel suggested the appointment for Petitioner of counsel not representing any other defendant, in order that Petitioner might be represented "by counsel who had no other interests in this case save his own." (J.A. 116) The court had indicated that "some new lawyer who could come into this case" would suffer for want of familiarity with it. (J.A. 102) In response to the government's suggestion, the judge asked whether Petitioner would accept an attorney "who was appointed by the Court who he himself had not chosen." (J.A. 116) Petitioner said he wanted an attorney, and had been looking for one. The Court said that this was not an answer to the question, and insisted upon a direct answer. The defendant finally answered: "Your Honor, I would not accept another lawyer, because I want my own lawyer." (J.A. 116-117)

The judge thereupon denied the government's motion and directed the defendant "not to make any demonstrations." He advised the defendant that the limited education was not material because "my father never went any farther in school than you did, and I never knew a better educated man from the standpoint of understanding human nature. . . . Formal education is not the criterion of success." (J.A. 117) The court instructed the defendant not to make "silly objections" because it constituted interference with the lawyers.

Petitioner stated that he was attempting to contact another lawyer, but the Court advised him that the lawyer was going to be starting "the Hoffa trial . . . It is a wonder to me that you do not call for Mr. Belli." (J.A. 118)

Petitioner said he had another motion. The court stated that its patience was wearing thin, and threatened Petitioner with revocation of bond (J.A. 119).

Petitioner again moved for a continuance (J.A. 119, 120). The court said that it had spoken to Petitioner's counsel, and had been advised that he would not be back that week, so the motion would be denied. (J.A. 120)

The court then recalled the jury, and instructed them that petitioner's lawyer had been taken ill; that there was "no conflict of interest whatsoever" between petitioner and the other defendants, but that petitioner had refused to accept representation by other counsel in the case; that each of the lawyers had been willing to represent him, but that Petitioner had refused such services; that Mr. McDonnell had not asked to be relieved of petitioner's representation, but that it was Petitioner who refused to accept his services; that the government had suggested the appointment of "outside counsel", but that Petitioner had refused that offer. The Court advised the jury that "we have done everything we can to get him representation, fair representation—the court has."

The court further instructed the jury that "an outside lawyer, the best of them, could not begin to represent him as well as any one of these other lawyers." He stated that Petitioner had a right to make objections even though he was objecting "to cross examination or examination by other lawyers that might be to his interest." The court concluded the instruction by expressing the desire that the jury "understand that he is not being compelled to represent himself except under the conditions which I have outlined." (J.A. 122-123)

Thereupon, cross-examination of the witness resumed. Shortly thereafter, and not in response to any objection or other matter appearing of record, the court stated that Petitioner was disturbing the other lawyers, and directed that the Marshal cause petitioner to be seated "back there with you." (J.A. 123)

When the examination of the witness was concluded, the Court asked Petitioner whether he had any questions (J.A. 123). Petitioner asked that the jury be excused. The Court directed Petitioner to state whether he had any questions of the witness. Petitioner replied that he had been unable to hear what the witness had said. (J.A. 124)

The Court again asked if Petitioner wished to question the witness. Petitioner answered that he did not know whether he did or not, "because I don't understand law, and I wouldn't be able to give you a truthful answer." The court excused the jury, and Petitioner said that he was nervous and sick. The court recalled the jury, and pressed Petitioner for a statement as to whether he had any questions. Petitioner again stated that he had not been able to hear the testimony.

In response to repeated demands, Petitioner persisted that he was unable to decide whether to ask questions because he had not heard part of the testimony, because he did not understand law, and "because I don't have counsel." The court directed that "the record show he has been given every opportunity to ask the question. He persists in not asking the witness any questions." (J.A. 125)

Subsequently, the court directed another defense counsel, whose representation extended to the substantive counts, to make objections or motions on Petitioner's behalf,

"whether he accepts it or not . . . whether he joins in or asks you to or not. . . . whether he . . . consents or not." (J.A. 126)

The Court inquired whether any lawyer could think of any question to be asked on Petitioner's behalf, and was told "No." Petitioner apologized, but objected to the representation by lawyers who "have other clients to represent. I do not feel right about it." (J.A. 127)

Still later, at Petitioner's request, counsel for a co-defendant "asked me, not as his attorney, to state to the Court that he would like the Court—so he would not interrupt—to have a standing motion as to each session that he is making a motion for a continuance because he does not have his counsel." The motion was denied. (J.A. 136)

Thereafter, Petitioner prepared and caused to be read to the Court, a statement reiterating his position. Essentially, he objected to the evidence, stated that he was emotionally and professionally unable to represent himself, stated that he did not want other counsel in the case to represent him because they had their own clients and he would not get proper representation. He asked for a severance. The request was denied. (J.A. 143)

Eight days after his attack, having missed six days of evidence, Petitioner's counsel returned to the trial. He stated that he was unable to "accomodate my client to the extent that he wants to be accomodated", but that he was able to provide "reasonable assistance and representation" on a more or less limited basis. The trial proceeded, and the prosecutor agreed to notify counsel in advance of any evidence specifically concerning Petitioner. (J.A. 167-168).

The first direct reference to Petitioner by any witness, came in the testimony of Barbara Mitchell, about two days following the return of Petitioner's counsel. Petitioner's

name had not been mentioned by any witness prior to counsel's illness, although his counsel had cross-examined a witness (J.A. 57).

When the government tendered all evidence against all defendants, counsel for Petitioner objected to the introduction against him of any testimony taken at a time when he was not represented by counsel. That objection was overruled, and the evidence was received against Petitioner. (P.A. 5, 6)

EVIDENCE REFERRING TO THE PETITIONER

Petitioner was named in only one of the forty counts of the indictment: the conspiracy charge. He was given a statutory minimum sentence of five years upon his conviction, which was the only minimum sentence imposed (J.A. 8). He had no previous record of convictions (J.A. 383). He was mentioned by only five of the government witnesses, and much of that testimony was merely corroborative of his presence at a restaurant frequented by other defendants. Detailed discussion of the evidence concerning him, including related matter not directly involving him, is here presented with the assurance that a very complete presentation can be made with brevity.

The Mitchell Incident

Government witness Barbara Mitchell was arrested in April of 1962 in St. Louis for the sale of narcotics (J.A. 199) to a government agent (J.A. 198). She thereupon gave a statement (J.A. 199) detailing her experiences as an "investor in narcotics" (J.A. 200) and a courier of narcotics from defendant Cole commencing in April of 1960. (A. 190) In the course of her association with Cole, she deviated from time to time from her normal activities,

and in doing so, she testified, she had fortuitous but highly incriminating encounters with a number of defendants, each of whom she saw only once (J.A. 195, 196) in addition to others with whom she dealt frequently. (J.A. 190-198).

On giving her statement, Miss Mitchell, who had theretofore been convicted of larceny and forgery in separate incidents (J.A. 190), was released on bail (J.A. 200). At the time of her testimony she did not know whether she was still under indictment (J.A. 199).

Within her statement she described an incident which occurred about August 22, 1961 (J.A. 206). (The indictment set the date as "during or about the month of September, 1961", J.A. 13, but Miss Mitchell did not mention this incident in her grand jury testimony, Tr. 2596).

On that day, she testified, she was invited to take a ride with defendant Cole. She was not aware that the ride had an illegal purpose (J.A. 206). The two of them went to a motel parking lot, where a man entered the car and received $5,000.00 from Miss Cole. In exchange, he gave Miss Cole some "stuff . . . so strong he had to put on a mask while mixing . . ." (J.A. 196)

Witness Mitchell, in her testimony, identified this man as petitioner Passini (J.A. 196). She had seen him only that one time, and not again before taking the stand 32 months later (J.A. 208). She recalled nothing unusual about him, and could not remember whether he had worn a mustache, and could not describe or characterize his voice. In entering and leaving the car, and in walking away, there had been nothing unusual about his actions (J.A. 207).

Petitioner, in testifying and denying the episode, pointed out that his left leg had been removed at the hip in con-

sequence of a hunting accident at the age of eleven; accordingly, he could not walk normally, and could not enter and leave vehicles and walk away from them like other people. (J.A. 383, Tr. 5045) Agents who had observed petitioner, also testified as government witnesses to his pronounced limp ("He walked like a man with one leg or wooden leg"; P.A. 5).

Miss Mitchell had been in the front seat of the car ("I just sat there, faced forward . . ."), and the man she identified as petitioner had climbed into the rear seat before she saw him (J.A. 206). In describing the incident to the agents, she said she was not sure whether she could identify the man if she saw him again, because she had been sitting in the front seat while he was in the back seat. At first she denied having said that, but confronted with her written statement, she then admitted it. (J.A. 207-208, Tr. 2651).

Miss Mitchell's testimony concerning this episode was not corroborated.

The Incident of September 16, 1963

During the period of more than two years following Miss Mitchell's statement, an intensive investigation was made. Defendants Cole and Johnson were indicted and arrested, with 30 others "in different cases", in December of 1961 (J.A. 95, 96). Government agents observed and participated in purchases of narcotics involving many defendants (J.A. 152, 224, 238, 247, 252, etc.). Defendant DeMaro was also arrested in December of 1961 (J.A. 250) and indicted in a charge "superseded" by the indictment here referred to (J.A. 386).

However, no witness testified to any observation of petitioner, or even to any declaration relating to him, from the time of the Mitchell episode until September 16, 1963, more than two years later.

Petitioner Passini testified that he had been friendly with co-defendant DeMaro for many years, and had worked with him until 1961. During that period, he frequently met DeMaro at Andy's Grill, located in a neighborhood where Petitioner once lived. Subsequently, as a salesman, he would make two or more trips weekly to a firm on the north side of Chicago where his home improvement sales were financed. In doing so, he would sometimes stop at Andy's Grill to eat or drink, and had met and talked with DeMaro on some of those occasions (J.A. 381-382).

Petitioner testified that he had no specific recollection of September 16, 1963 (J.A. 382). From the testimony of agents, it appears that on that date, co-defendant Frank Carrioscia was observed discussing a sale of narcotics to a government informant (J.A. 305). Carrioscia went from there to Andy's Grill. Some time later, Petitioner drove up and entered the grill. Carrioscia and Battiato then left the grill and had a conversation on the sidewalk (J.A. 255). They separated, and met again at Battiato's home where Battiato gave Carrioscia a package. Carrioscia then drove to a bar on the near southwest side where he delivered narcotics to the informant (J.A. 256).

Petitioner, meanwhile, was seated at Andy's Grill conversing with DeMaro. An agent, seated four feet away, found nothing in their conversation to merit repetition in his testimony, to the extent that he observed it. Battiato, having apparently observed the agents following Carrioscia's car after his delivery of narcotics to Carrioscia, entered the grill. He walked to the table where DeMaro

and Passini were seated, and announced, "We are in trouble." Petitioner looked up and asked, "What is wrong?" Battiato, looking at DeMaro, stated that a vehicle had followed "Frank" (J.A. 306).

Two agents testified that Petitioner then asked, "Do you think we should call Frank?" (J.A. 284, P.A. 2) DeMaro, addressing his attention to Battiato, answered in the negative, stated that Carrioscia had not yet had time to reach his destination, and said "We will go over there." Thereupon, all three left the grill. Petitioner entered his car, drove away, and was not followed. Battiato and DeMaro entered their car and went to Carrioscia's destination where they met him and conversed. Petitioner was not seen again that night (J.A. 306, 284).

The recitation of the opinion that petitioner "suggested that Carrioscia be contacted" (Appendix A, p. App. 10) is a quotation from the government's argument in that Court. Petitioner only inquired whether that should be done, and was informed that it was not possible because Carrioscia had not yet arrived at his destination.

Agent testimony concerning Carrioscia's activities, establish that it was the pattern that he would arrange his narcotics transactions on the near west side, and then meet Battiao, DeMaro, or both at Andy's Grill or at another nearby tavern in the vicinity of Battiato's north side apartment. He would receive a package, and then make delivery at or near his west side headquarters (J.A. 293-297; 273, 276, 277). September 16, 1963, was the only date on which Carrioscia's visit to the north side area coincided with Petitioner's presence there.

The incidents of September 27, 1963

Theodore ("Ted") DeRose, one of the original defendants in this action, was severed from the trial after its commencement when he was hospitalized. That occurred prior to the reception of evidence concerning the events of September 27, 1963.

Notwithstanding his severance, DeRose was shown by the evidence to be heavily involved in the narcotics traffic. On a number of occasions, he delivered a package to Battiato on the sidewalk in front of Battiato's home (J.A. 267, 269, 258).

Petitioner and DeRose both walk with a limp: petitioner in consequence of amputation, DeRose because of organic illness (P.A. 4, J.A. 383, 270).

In its submission to the Court of Appeals, the government successfully contended that the evidence had shown that on September 27, 1966, Petitioner "was seen bringing a brown paper bag to Battiato's apartment . . ." (Gov't Brief in Court of Appeals, pp. 48-49).

To support that assertion, the government relied upon the testimony of Agent Aruslan, who testified that in the evening of September 25, 1963, he saw Battiato walk back and forth in front of his home, and saw DeRose walk by and give Battiato a package. Two nights later, Battiato again began to walk back and forth in front of his home (J.A. 267), an area obscured by shadows (J.A. 271). Shortly after Battiato began walking, Aruslan testified, "Angelo Passini walked west toward Battiato's residence. Ted DeRose was walking with a noticeable limp and he was carrying a brown paper package under his left arm. Angelo Passini met Battiato in front of the building and they both entered." (J.A. 267)

On two subsequent nights, Agent Aruslan again saw Battiato walk back and forth in front of his home. Both times, he was met by DeRose (J.A. 267-268, October 8, 1963; J.A. 269, October 15, 1963).

The contents of the packages were not proven.

Another agent offered conflicting but incriminating evidence concerning petitioner's activities that night. A few minutes after petitioner, according to Aruslan's testimony, entered Battiato's home, Agent Patch testified that he saw Petitioner, whom he did not then know, enter Andy's Grill and advise "Mike" (DeMaro) that "Frank" (Carrioscia) had only brought a thousand dollars, and would be there shortly. According to Patch, DeMaro expressed dissatisfaction with the amount (J.A. 272).

This was Patch's first sight of the speaker, and nobody else was present to make an identification. The speaker was "subsequently identified" as petitioner, but there is no evidence as to how that was done (P.A. 3). Patch, pretending to be an amorous conventioneer, had had at least two drinks before seeing the speaker. Agent Connolly, who was maintaining surveillance outside Andy's Grill (P.A. 2) and who testified to his observations, did not testify to seeing Petitioner enter; rather, at about the time Patch says he saw Petitioner arrive, Connolly saw DeRose enter the grill (J.A. 258). Aruslan, continuing to observe the Battiato building, told of Battiato leaving the building, but did not mention petitioner doing so (J.A. 267). Agent Connolly saw DeMaro meet Carrioscia an hour later, express to Carrioscia considerable satisfaction at receiving from him a thousand dollars, and then rejoin DeRose (J.A. 258).

Agent Olivanti, who had Carrioscia under surveillance all evening, and who knew Petitioner, did not see Petitioner on that date. He followed Carrioscia to the grill area, and saw him meet with Battiato and DeMaro and receive a paper bag from them (J.A. 284, 285).

The incident of October 15, 1963

In its submission to the Court of Appeals, the government did not rely on the events of October 15, 1963, as demonstrative of petitioner's guilt. (Gov't Brief in Court of Appeals, pp. 48-49). However, it is the only evidence in the record, except for that hereinabove cited, of any observation of or reference to petitioner by or in the presence of a government witness. It is submitted in the interests of completeness of presentation, and because it may be relevant to an understanding of petitioner's relationship to his co-defendants.

In the late afternoon of October 15, 1966, Battiato, De Maro, and DeRose were standing in front of Andy's Grill in conversation. Petitioner arrived. The group thereupon dispersed. Petitioner left (J.A. 269).

He was not followed, either by the government or the conspirators.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I.

Denial of the Right to Counsel

In the aspect of the trial court's handling of the situation created by the disability of Petitioner's counsel, it is hard to believe that the record before your Honors is that of a contemporary Federal criminal trial.

At an early state of his trial, and without the slightest fault on his part, Petitioner was suddenly thrust into the least enviable situation which can befall a criminal defendant: He was deprived of his lawyer. He was denied the most meaningful of the safeguards provided by the Constitution.

The deprivation was total. The only representation available to him, was on a makeshift basis from lawyers whose principal allegiance was to others. Consultation, to all effects, was totally denied him.

He was without formal education, and without courtroom experience. His difficulties demanded consideration.

His lawyer was absent for six trial days. The first day, Petitioner accepted representation from another lawyer in the belief that it would only be for "a few minutes." (J.A. 69) The second day, he accepted McDonald only after receiving threats and verbal bludgeonings from the trial judge, and for that one day only (J.A. 98-103). For the remainder of his lawyer's absence, Petitioner was totally deprived of any semblance of his right to counsel.

From the trial court, charged with the protection of his rights, he received only rebuffs. He was cowed, bullied, and overpowered. He was denied both fairness and common courtesy.

The directions given to him constituted a mass of contradictions that would have defied analysis by the most seasoned of lawyers.

When it was first learned that his lawyer had been taken to the hospital, he was told to finish out the day's court session, and then make inquiries concerning his lawyer's condition and, if necessary, "be prepared to look for additional counsel tomorrow." (J.A. 78)

On "tomorrow", his inartistic but unequivocal request for continuance or severance, was met with the startling suggestion that "if" he wanted to hire a lawyer, "he had yesterday to do it." (J.A. 69)

The next set of directions related to Petitioner's rights, duties and status at the trial. After further colloquy, the trial court told the defendant to represent himself. Having conferred upon Petitioner the unwanted status of ad-hoc lawyer, the trial court enlightened him as to his status by directing him "to sit down and . . . conduct yourself as an individual here and as a defendant. Do you hear me?" (J.A. 102)

Petitioner heard him. Not unreasonably, he tried to ask a question. At least one question compellingly suggests itself to any reader of the record at this point. But petitioner's question will never be known. The trial court welcomed him to his uncertain status, by directing the Marshal to force him to sit down (J. A. 102).

On the following day, after the trial judge had clearly ruled that nobody had any duty to protect Petitioner's rights (J.A. 114), Petitioner objected to a question asked

on cross-examination by "co"-counsel. His objection was that "these people are all strangers to me." Granted, that is about as inartistic a phrase as any "lawyer" ever used to make the objection that the transaction had not been shown to have the slightest connection with the objecting defendant. But there is also no question that the objection was legally sound. The trial judge thought that it was "silly." (J.A. 118) The court cautioned him against "demonstrations", and told him to make his objections "as a lawyer would make them." (J.A. 115)

The fact that Petitioner was totally unqualified to meet the standard which the court imposed upon him, was not considered by the trial judge to be a mitigating circumstance. The court offered Petitioner the cold comfort that formal education was relatively unimportant. "My father," the trial judge recalled, "never went any farther in school than you did, and I never knew a better educated man from the standpoint of understanding human nature." (J.A. 117) However, Petitioner's liberty depended upon his understanding of *law*. The irrelevance of an understanding of human nature to the resolution of Petitioner's difficulties, is manifest in many of the observations of the trial judge.

The trial judge knew human nature. "I know how to handle fellows like you," he advised Petitioner. Unless Petitioner somehow contrived to act as his own lawyer and at the same time "conduct yourself like these other defendants . . . I will have to revoke your bond and put you in custody . . . Now, that is exactly what I am going to do." (J.A. 119)

Such a threat, of course, is a grave impropriety. Bail should never be denied as a disciplinary matter. *Reynolds v. U.S.*, 4 L.Ed 2d 46, 48 (memorandum). But Petitioner

did not know that, and the trial judge said he had done it before (J.A. 119). Petitioner might well have believed that he had *no* rights remaining to him.

Charged, willy-nilly, with the conduct of his own defense, Petitioner did not do nearly so well as an earlier pro-se litigant named Clarence Earl Gideon (*Gideon v. Wainwright*, 372 U.S. 335, 337). But then, Petitioner did not enjoy Gideon's advantages or resources as trial "counsel". Almost as soon as Petitioner was resigned to the practice of his unwanted profession, he was advised, for reasons not apparent of record, that his presence was "disturbing the *other* lawyers." (J.A. 123, emphasis added). Thereupon, the Marshal was directed to move him "back there." "Back there" was a place where Petitioner was unable to hear the testimony (J.A. 124).

Thus, to Petitioner's right to counsel himself, there was added the right to confront his accuser at long range, with visual faculties only.

Petitioner defended himself through a glass, darkly.

If the right to counsel has any meaning at all, it means something substantially more than Petitioner received.

The court was constantly concerned, and expressed its concern vividly. But the concern was not that Petitioner was being deprived of basic rights; it was concern lest the jury might feel more sympathy for him than did the trial judge (J.A. 102). To forestall such "prejudice", the court moved promptly, vigorously, and repeatedly. It lost no opportunity to express its scorn for the Petitioner, whose knowledge of "human nature" had not encompassed an appreciation of the availability of a motion for mistrial.

The court accordingly advised the jury that the defendant was representing himself, only because he had unrea-

sonably refused to accept the services of other counsel in the case. By way of assuring the jury that petitioner was less an individual than a part of a group, the judge made it clear that there was "no conflict of interest whatever" between Petitioner and the other defendants. In the court's expressed view, Petitioner had ungratefully refused to accept the noble offer of protection from a lawyer representing the very defendant (DeMaro) whose acts the jury was most likely to attribute to Petitioner, and whose plain guilt necessarily prejudiced other defendants. The trial judge pleasurably recalled past associations with the other lawyers in the case, to no apparent relevance. The court cautioned the jury that it would generously extend to Petitioner his right to make objections, even though they might be made improvidently to evidence that was really helping Petitioner. It particularly cautioned the jury to understand that it was only Petitioner's obtuseness which caused him to represent himself (J.A. 121-123).

On that basis, the trial judge assured the jury that "we have done everything we can to get him representation, fair representation—the court has." (J.A. 122)

To which any objective reader of the record must demur. The court had not been nearly so exhaustive or resourceful in that regard, as its prideful statement to the jury would indicate. For when, on the morning after his lawyer's illness, petitioner asked for "some time to get a lawyer" (J.A. 101), the trial court not only flatly denied the request (J.A. 101) but expressed amazement that Petitioner would dare ask for an adjournment "for your convenience." (J.A. 100-101). The request was not even slightly unreasonable. It was a matter of substance, necessity, and right, not "convenience." And it was the very thing which the trial judge had, on the preceding day, led the Petitioner to expect (J.A. 78).

Nor was any meaningful representation offered to Petitioner.

The Trial Court's disappointment at Petitioner's reluctance to accept newly appointed "outside counsel", is completely inappropriate. Before making the offer, the Court had admonished Petitioner that a lawyer thus appointed would not be able to do a very good job for him because of his unfamiliarity with the case (J.A. 102). It is hardly surprising that Petitioner would not agree to a procedure which the Court itself had termed unsatisfactory. The Court later repeated that such representation would not be particularly effective (J.A. 122).

Nor would Petitioner have received completely effective protection from another lawyer representing a co-defendant. The allegiance of such a lawyer would have been divided in terms of representation; and Petitioner would properly have felt restricted in his consultation with such a lawyer.

Petitioner requested, and was entitled to, counsel whose only allegiance would be to him. In view of the complicated nature of the evidentiary picture, such a lawyer was indispensable for any defendant as to whom the evidence was thin—and it was tissue thin as to Petitioner. The trial judge asked Petitioner to accept counsel whose principal loyalty was to other defendants heavily involved. The court particularly emphasized the availability of Mr. McDonnell, whose client (DeMaro) was clearly shown to be guilty of infamous behavior at a place and time at which the Petitioner claimed to be present coincidentally and innocently. It is also worthy of note, that after Petitioner had testified that he worked with DeMaro years before the offenses charged and was friendly with him (J.A. 381, 382), DeMaro testified that during that period his pro-

fession had been that of confidence man frequently arrested, and that Passini was involved in those activities (J.A. 387). Clearly, Petitioner's liberty depended upon the jury's believing that there was no unlawful connection between him and DeMaro. No lawyer could competently represent both men except in the most routine and irrelevant matters, such as the testimony which was being introduced when Petitioner's lawyer first felt ill (J.A. 69).

Even worse, if possible, than attempting to foist conflicting representation on Petitioner, was the trial judge's assurance to the jury that "no conflict of interest whatever" existed between Petitioner and the other defendants (J.A. 121). That assurance was totally incorrect. The trial judge had no basis for it, save for the assurance of the government, which could not possibly know if it were true. And even if it had been true, so to advise the jury was still an obvious impropriety. There may be no legal "conflict", but the jury could well infer association from the judge's remark. Petitioner, insisting upon his innocence, had at least some conflict of interest with any other defendant whom the jury might believe to be guilty. It was necessary for him to disavow the taint of association. The trial judge's remark made it impossible for him to do so.

* * *

On that state of the record, the Court of Appeals has found that the trial court "committed no error in handling this difficult situation."

But even to make such an evaluation, one must first assume as a premise that the trial must proceed, whether or not the Petitioner were represented by counsel, and notwithstanding that he certainly did not waive that right.

The "difficult situation" would not have been the least bit difficult, if the trial court had shown anything beyond

a perfunctory concern for Petitioner's right to counsel. Available remedies for the situation were:

A. The declaration of a mistrial as to Petitioner. Such action would have given Petitioner no unconscionable advantage. He had yet to hear the first word of the government's theory as to him. A separate trial for Petitioner would entail the calling of only five government witnesses. That seems a small price for the preservation of the integrity of the basic right to counsel.

B. A postponement sufficient to enable Petitioner to find a lawyer and acquaint him with the case sufficiently to enable him to act. True, that would have delayed the trial. But if it were deemed so vital, for no reason now apparent, to try Petitioner as part of a group rather than individually, it is at least equally vital to provide him counsel of his choice while he is being tried.

C. At a basic, irreducible, minimum—the very least to which Petitioner was entitled, by any known Constitutional standard—the evidence received in the absence of Petitioner's counsel, should have been excluded as to him. A specific motion for such relief was made and denied when the questioned evidence was offered against Petitioner. (P.A. 5, 6).

* * *

But for the incredible treatment received by Petitioner at his trial, and the approval of that treatment by the Court of Appeals, we should have deemed it nothing more than unwholesome and puerile pedantry, to urge to this Court the importance of the right to counsel.

The right is basic. It is of express Constitutional dimensions. It has been jealously guarded, and recently extended,

by this Court. *Gideon* v. *Wainwright*, 372 U.S. 335; *Escobedo* v. *Illinois*, 378 U.S. 478; *Miranda* v. *Arizona*, 384 U.S. 436.

And it is seriously imperiled by the decision of the Court of Appeals here sought to be reviewed.

The philosophy underlying that opinion, is that trials are given to groups, rather than to individuals. The test of the right to counsel, according to the opinion, is not whether a defendant is being tried, but whether he is being directly and personally accused from the witness stand.

The Court of Appeals here has flatly held that as long as a witness is merely giving background material, which will not be admitted against the defendant until further evidence has been heard, the defendant is not entitled to a lawyer.

The doctrine is fearful. It is at war with every expression on this issue which has ever been heard.

And it carries within itself a fatal contradiction. If the evidence was immaterial to a consideration of Petitioner's guilt, it should not have been admitted against him. If it was sufficiently material to merit ultimate admission against Petitioner, then Petitioner was entitled to counsel when it was being received.

It would unduly prolong this petition to discuss the testimony of each witness heard in the absence of Petitioner's counsel. But it is worthy of note that during the absence of counsel, a witness testified that Petitioner's supposed co-conspirator, Isaacson, could obtain only low-quality narcotics (J.A. 144, 145) at the very time when, according to later testimony, Petitioner was mixing narcotics so rich as to be dangerous (J.A. 196, 206). That type of logical contradiction would only suggest itself to a lawyer present

at the trial and concerned with the analysis of each item of evidence in the light of its relationship to Petitioner. It was that kind of representation which Petitioner repeatedly requested; and he was entitled to nothing less.

Above and beyond the question of representation, was the equally important right of consultation. This was denied to Petitioner entirely. Petitioner could not with confidence discuss evidentiary developments with lawyers whose principal allegiance was to others; and there is no slightest reason why he should have been required to do so.

The right of consultation has properly been accorded an importance equal to the right to representation. In *United States* v. *Venuto,* 3 Cir. 1950, 182 F.2d 519, 522, a criminal conviction was reversed because the defendant had been denied the right to consult with his attorney over a period of 18 hours.

In the case here sought to be reviewed, the Court of Appeals ignores and, *sub silentio,* denigrates the importance of the denial of that right over a period of six trial days and eight calendar days.

We do not ask that this Court speculate whether a six-day denial of the right of consultation, is eight times more serious than an 18-hour denial. Arithmetic is inapplicable. The right has been denied. A right of that magnitude and importance is not denied somewhat, or partially, or moderately. It is a right which is granted, or which is denied. There is no middle ground.

As this Court stated in *Glasser* v. *United States,* 315 U.S. 60, 76:

> "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

The opinion below goes beyond "nice calculation." It imposes upon a defendant who has been denied counsel over a period of six trial days—unable to cross-examine, to reason out inferences, to consult, to defend himself against a determined onslaught by the trial court itself—the duty to demonstrate wherein he was prejudiced by the absence of counsel. It concludes that the Petitioner has not carried that burden.

If such burden existed, Petitioner has carried it amply. But it does not exist. The proper rule, we submit, is the directly contrary holding of *United States* v. *Venuto*, 3 Cir. 1950, 182 F. 2d 519, 522:

> "We reject the Government contention that defendant and his counsel must prove affirmatively the exact prejudice produced by (denial of right of consultation). (This would) require them to disclose what would have been privileged communication between attorney and client . . . (and would violate the rule of *Glasser*, supra)."

* * *

There was used against Petitioner evidence taken and rulings, many of them highly questionable, made at a time when he did not have counsel in contravention of the guarantee of the Sixth Amendment. The procedure approved below, is much greater incursion into the right of counsel, than that which, upon the same principle, impelled reversal in *Massiah* v. *United States*, 377 U.S. 201. The conduct of Petitioner's trial, inflicted upon him a deep and basic wrong. The conviction was the product of obvious unfairness, and should not be permitted to stand. The precedent set below is ineffably dangerous, and contains the seeds of mischief which could effectively destroy the right to counsel.

II.

The Sufficiency of Proof of Guilt

Petitioner was charged with the crime of conspiracy. This is a charge which deservedly enjoys considerable popularity in prosecutive circles, largely because its preferment often obviates the necessity of proof of guilt. (24 Brooklyn L. Rev. 1; 44 Marquette L. Rev. 73)

In affirming Petitioner's conviction, the opinion relies upon two supposed facts. Even by the relatively lax standards applied to the evaluation of evidence in conspiracy prosecutions (3 Buffalo L. Rev. 242, 251), those facts are not established by the record. Nor are any other facts presented, sufficient to justify conviction.

It is, perhaps, unusual to petition for certiorari on the grounds that the Petitioner is not guilty; and this Petitioner urges that precise contention.

But the generally accepted elements of due process, are: notice, an opportunity to be heard, and findings based on the evidence. *Tot* v. *U.S.*, 319 U.S. 463, 473 (concurring opinion); *Smith* v. *Dental Products Co.*, 7 Cir. 1948, 168 F 2d 516, 519.

Of the three elements, Petitioner was accorded only notice.

* * *

The opinion relies upon a supposed suggestion by Petitioner that Carrioscia be contacted under incriminating circumstances.

That recitation within the opinion, is not the product of the evaluation of evidence by the Court; it is, and purports to be, only an uncritical acceptance of a statement in the Government's brief.

The statement is in error. Petitioner did not "suggest" that Carrioscia be contacted. True, one witness so testified on direct examination (J.A. 306); but on cross-examination, it clearly appeared that Petitioner merely *asked,* in highly equivocal circumstances, whether "Frank" should be called (P.A. 2). Another government agent-witness also testified that Petitioner had merely *asked* whether "Frank" should be called. (J.A. 284).

The difference is profound. To "suggest that Carrioscia be contacted" might well be highly sinister. But, in the context of that conversation, to *ask* whether "Frank" should be contacted is on its face completely innocent. "Frank" was not identified in the conversation; and there is no more reason to believe that "Frank" was considered by Petitioner to mean Carrioscia, than to think that it might be any other "Frank", including the perfectly innocent "Frank" who owned Andy's Grill (J.A. 389).

More to the point, however, is the fact that even if the conversation be given the most sinister possible implication, it would not constitute Petitioner a conspirator. For in response to Petitioner's question, the conspirators responded that calling Frank would be a completely impractical idea. Accordingly, "Frank" was not called (J.A. 284, 306).

The significance of that development, is that there was no agreement between Petitioner and the conspirators. And a conspiracy requires an agreement; by definition, a conspiracy *is* an agreement. 72 Harvard L. Rev. 926. Here, there was no agreement. There was, at worst, a mere unaccepted offer to conspire, which is insufficient to constitute the offeror a conspirator.

Viewed in the context of all of the evidence, the conversation is completely innocent in its character. The pattern of evidence clearly shows that Petitioner was a mere tol-

erated bystander, as a friend of DeMaro, at the scene of unlawful activity. He did not participate in the conspiracy, and the conspirators took substantial precautions to prevent him from learning anything about the operation. Thus, characteristically, when Petitioner blundered into a conversation concerning crime, the conversation ceased and adjourned to another place (J.A. 269, 255).

Anent the conversation concerning the possibility of calling "Frank", the testimony of the eavesdropping agent makes it clear that the discussion was between Battiato and DeMaro. Passini was obviously an interloper, and was ignored by the conversants (J.A. 306). The context of the conversation makes it very clear that Petitioner did not know what was going on. Battiato and DeMaro knew, as anyone knowledgeable concerning the transaction must have known, that Carrioscia had just left the area, and that it would take him some time to reach his destination. The agents' account of the conversation, makes it very clear that Petitioner knew none of these things, and is persuasive evidence of his innocence.

Following the conversation, Battiato and DeMaro went to Carrioscia's destination, and Petitioner went on about his business somewhere else. Two agents were present, and both chose to follow Battiato and DeMaro and to ignore Petitioner (J.A. 306, 307, 284).

Every circumstance surrounding the conversation, is inconsistent with Petitioner's supposed status as a conspirator.

* * *

The other item of evidence relied upon within the opinion of the Court of Appeals to demonstrate Petitioner's guilt, is the "Mitchell episode" discussed in the Statement of the Case. The testimony of witness Mitchell is cited to

show that Petitioner delivered heroin to a car in which she was sitting. But it was *physically impossible* for her testimony to be true. She testified that Petitioner got into the car, got out of the car, and walked away in a normal manner (J.A. 207). But he could not possibly have done that; his left leg was removed at the hip years ago, and he cannot possibly enter and leave an automobile and walk away in a normal manner (J.A. 383). His wooden leg gave him a noticeable limp to which the agents testified (J.A. 270; P.A. 5).

Witness Mitchell, who had somehow managed to observe incriminating acts on the part of almost every defendant on trial, is much less than certain concerning her identification of Petitioner. The supposed event occurred two years before Petitioner entered the testimonial picture painted by the government agents. Mitchell had not seen Petitioner before she testified. She could not even remember whether the man she saw had a mustache. She had furnished no description to the agents when she told her story, explaining that she was not sure whether she could recognize the man again because of her limited opportunity for observation (J.A. 207-208). The idea of a man entering a car and identifying himself as a narcotics peddler in front of a stranger, is sufficiently startling in itself to justify considerable suspicion of Mitchell's testimony.

But in any event, it remains a stark fact that the story of witness Mitchell would have been a physical impossibility for Petitioner.

At pages 48 and 49 of the Government's brief in the Court of Appeals, three other supposed facts are cited to support the claim of Petitioner's guilt. The evidence relative to each of the incidents relied on by the government,

is fully discussed in our Statement of the Case. We will here briefly argue the inferences of each of the incidents relied upon by the government, in order to demonstrate the lack of any basis for Petitioner's conviction.

The government cited (Br. 48) Petitioner's "close association" with Battiato and DeMaro. Petitioner testified to a long friendship with DeMaro (J.A. 381); and Battiato is DeMaro's brother (J.A. 387). Such association is in no sense incriminating. But we wonder whether the government realizes what it has revealed, in urging that literal concept of guilt by "association".

Next, the government claimed (Br. 48-49) that "Passini was seen bringing a brown bag to Battiato's apartment . . ." Not so. The agent testified: "Several minutes later, Angelo Passini walked west toward Battiato's residence. *Ted DeRose* was walking with a noticeable limp and he was carrying a brown paper package under his left arm." (A. 267) DeRose was in fact shown by the evidence to be heavily involved. He had a very noticeable limp, just like Petitioner (J.A. 383, 270; P.A. 4) The similarity of walking styles may explain a great deal, especially in view of the government's obvious confusion as shown by its submission to the Court of Appeals.

Finally, it was claimed that on the same night, Petitioner ". . . participated in a conversation . . . regarding payment for the heroin. . . ." (G. Br. 49). Again, this could not have happened. The incident is supposed to have occurred in Andy's Grill (J.A. 271, 272). But at that time, another agent testified that Petitioner was in Battiato's house (J.A. 267). Agent Connolly, maintaining surveillance outside Andy's Grill, did not see Petitioner enter (J.A. 258; P.A. 2). The testimony was offered by a man who had never seen him before; who referred in his report to ". . . (a)

man . . . *later identified* as Angelo Passini"; who had nobody with him to help make the "identification"; and who had had at least two drinks in the course of a convivial evening, before seeing the man he later identified. (P.A. 3). The testimony of presumptively sober government agents, shows that Petitioner could not have been there. But DeRose was (J.A. 258). And very tellingly, yet another agent had observed DeRose delivering "a brown paper bag" to Battiato (J.A. 258). Not Passini. DeRose.

And that is the totality of the evidence against Petitioner.

It is obviously insufficient to establish guilt.

CONCLUSION

No disinterested person could read the record of this case, without experiencing a deep sense of disquiet at the result.

Nobody can read the opinion of the Court of Appeals, without appreciating the impairment of the right to counsel implicit and explicit therein.

We pray that your Honors will consider this case worthy of review.

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 14714, 14722, 14723, 14737, 14861

SEPTEMBER TERM, 1965
APRIL SESSION, 1966

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

OPAL COLE, *et al.*,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

AUGUST 10, 1966

Before SCHNACKENBERG, KNOCH and KILEY, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Opal Cole and several other defendants[1] have appealed from a judgment of conviction entered by the district court on the verdict of a jury, after a trial on a 40-count indictment which named them and other persons as co-conspirators.

[1] Charles Cole, Jesse Cowan, Americo Di Pietto, James Isaacson, LaFauncie Johnson, Kirsten Spencer, Angelo Passini, Joe Battiato, Michael De Maro, Frank Carrioscia, and Zedrick Cameron. Subsequently the appeals of Cameron, Spencer, Isaacson, Battiato and Carrioscia were dismissed.

The theory of the government has been that the numerous defendants named were members of a conspiracy trafficking in narcotics, and that the conspiracy operated on three levels—suppliers, distributors and salesmen.

From our analysis of the voluminous trial record, we have come to the conclusion that there was evidence introduced which supports the theory of the government that defendants Di Pietto, De Maro, Ted De Rose, Battiato and Passini were suppliers of heroin who made available to defendants named as distributors large amounts of that drug. The suppliers allocated territories, consigned quantities of the drug, packaged wholesale amounts, and collected money from the distributors. The evidence tended to show that on the south side of Chicago defendants Opal and Charles Cole, together with Nolan Mack (who met death four days prior to the return of the indictment), were distributors.[2] Defendant LaFauncie Johnson was a seller and messenger for the Coles.

On December 12, 1961, about 11 P.M. Opal Cole was arrested by agent Hughes, who took her to her apartment, using her key for entrance. Finding Johnson in the living room, he arrested him. Incidental to the arrest of Johnson, a search was made and Opal Cole's notebooks were seized. Because of entries therein, they were clearly admissible as instrumentalities used in the crime charged in the indictment.

On October 25, 1963, De Maro and Battiato had a talk on a street corner at about 7:30 P.M. and an hour later, Mack picked up Battiato at the corner and drove to a

[2] There was evidence that on the west side the distributors were Cowan, Carrioscia, Isaacson, Charles Sparkman and Cameron.

building at 533 Belden, where Battiato lived and which he entered, returning a minute later to the car. He then gave Mack a package and Battiato went into his apartment and counted several bundles of money.

Mack met his death in an automobile on the same evening (October 25, 1963), as he was pursued by federal narcotics agents on a main highway through Chicago. During the chase he was shot by his pursuers and heroin was then found in his car. These circumstances were relevant to explain the condition of the heroin and the absence of the container in which Mack originally received the heroin.

1. Counsel for defendant De Maro, following the examination of Beulah Greenlaw, a government witness, requested the trial court to examine her testimony before the grand jury to determine whether the grand jury's minutes of that testimony should be turned over to counsel for use on cross-examination. The court examined the minutes and refused to turn them over to De Maro's counsel.

Defense counsel stated to the court that he believed that he was entitled to any minutes or notes taken during the course of the hearing of testimony before the grand jury, adding:

> "Judge, I think there will be conflicting testimony between anything which she stated before the Grand Jury and she has presently told this Court and Jury."

Government counsel admitted that the witness had testified before the grand jury. Defense counsel stated:

> "There is no way I can tell if there is any inconsistency between the Grand Jury testimony of the witness and that which she might have testified to here."

Government counsel handed the grand jury minutes to the court, which examined them but refused to turn them over to defense counsel.

We cannot say that defense counsel laid a basis for the inspection of the grand jury proceedings by the trial court. The most that can be said is that the record reveals a hope by the defense attorney that something in the testimony of witness Greenlaw before the grand jury was inconsistent with her testimony upon the trial. This is not sufficient to cause us to override the position taken by the district court here.

In *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395 (1959), the court said, at 398:

> "Petitioners concede, as they must, that any disclosure of grand jury minutes is covered by Fed. Rules Crim. Proc. 6 (e) promulgated by this Court in 1946 after the approval of Congress. In fact, the federal trial courts as well as the Courts of Appeals have been nearly unanimous in regarding disclosure as committed to the discretion of the trial judge. Our cases announce the same principle, and Rule 6 (e) is but declaratory of it. As recently as last Term we characterized cases where grand jury minutes are used 'to impeach a witness, to refresh his recollection, to test his credibility and the like' as instances of 'particularized need where the secrecy of the proceedings is lifted discretely and limitedly.' *United States* v. *Procter & Gamble,* 356 U.S. 677, 683 (1958).
>
> "Petitioners argue, however, that the trial judge's discretion under Rule 6 (e) must be exercised in accordance with the rationale of *Jencks*; namely, upon a showing on cross-examination that a trial witness testified before the grand jury—and nothing more—the defense has a 'right' to the delivery to it of the witness' grand jury testimony.

"This conclusion, however, runs counter to a 'long-established policy' of secrecy, *United States* v. *Procter & Gamble, supra,* at 681, older than our Nation itself. * * *"

2. Eighteen defendants went on trial. The indictment named twenty-two defendants and thirty-five unindicted co-conspirators.[3] The structure of the conspiracy and connection of the defendants therewith are shown largely by the testimony of four government witnesses, Barbara Mitchell, Houston Garner, James Faris and Charles Sparkman.

The evidence showed that Mitchell bought heroin from the Coles, Di Pietto and De Maro at a meeting where the distribution of narcotics and Mack's participation were discussed, and also that Passini received $5,000 from Opal Cole in payment for narcotics.

According to his testimony, Garner bought heroin from Opal Cole which was delivered to Garner by LaFauncie Johnson. He also saw De Maro with Opal during negotiations for the purchase by Garner of a wholesale quantity of heroin.

Faris said he purchased heroin from Cowan. In fact he went with Cowan to a meeting attended by Carrioscia where distribution of narcotics was discussed.

Sparkman testified he bought heroin from Carrioscia.

The Coles, Carrioscia and Cowan were distributors from whom the four government witnesses testified they bought heroin. Mack was also a distributor. These persons

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[3] One defendant was granted a severance for reasons of ill health. A directed verdict of acquittal was given one defendant and four others were acquitted by the jury. Of the twelve found guilty, the appeals of seven are now before us.

all obtained heroin from Di Pietto's group which included De Maro, De Rose, Passini and Battiato.

We need not encumber this opinion with the details marking the day by day transactions beginning in the spring of 1961 in which these four government witnesses, according to their own testimony, and as corroborated by other facts and circumstances in evidence, became associated with other conspirators in carrying out the extensive trafficking in narcotics shown by the record before us.

We can sum it up in the words of government counsel who have said in their brief:

> "In the instant case, the object of every conspirator was to sell the narcotics made available by the suppliers to the distributors so that the operation could continue. Just as the quality of the heroin was diluted by each on the way down, so the profits were skimmed by each on the way up."

Even though the contacts between the different conspirators as among themselves varied from day to day, if they were shown by the evidence to the satisfaction of the jury to have been engaged in a common plan to violate the narcotics acts, the evidence in the case at bar is sufficient to support a conviction on the indictment upon which defendants were tried. As was said in *Poliafico* v. *United States,* 6 Cir., 237 F.2d 97, 103 (1956), cert. denied 352 U.S. 1025:

> "* * * The fact that one such supplier did not have dealings with another supplier does not matter. If each performs the same role at successive stages for the same ends, and both know and participate in the plan of the others to buy and sell heroin at a profit, each is guilty as a conspirator. *United States* v. *Tramaglino,* 2 Cir., 197 F.2d 928. * * *"

Moreover, there having been competent proof of a conspiracy to violate the narcotics acts, none of the conspirators is in a position to object to the introduction into evidence of the acts of the co-conspirators, even though they were not all present on each occasion. Thus in *United States* v. *Iacullo,* 226 F.2d 788, 793 (1955), cert. denied 350 U.S. 966, we said:

> "As to the conspiracy count, proof of the September 18, 1953 offense was admissible as corroborative of other evidence received to prove that count, because the pattern of that transaction bore a strong resemblance to the pattern of other transactions proved to have taken place in carrying out the conspiracy. * * *"

Again, in *United States* v. *McCartney,* 264 F.2d 628 (1959), cert. denied 361 U.S. 845, we said, at 631:

> "* * * Evidence even of other criminal acts is admissible when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances thereof. United States v. Wall, 7 Cir., 1955, 225 F.2d 905; United States v. Crowe, 7 Cir., 1951, 188 F.2d 209."

While it is true that Mack was an unindicted co-conspirator (having died before the indictment was returned), the fact remains that defendants were on trial for conspiring with Mack to sell narcotics. Thus Mack's actions, including the disposal of the contents of a bag on an expressway as he drove his car with agents in pursuit, and the presence of heroin in his car, are relevant as proof of the conspiracy and the parts played therein by several of the defendants.

3. Counsel for defendants made a motion to suppress exhibits 8 and 9, described as "two address indexes".

The motion was denied and it is now claimed that this was error, being a violation of the fourth amendment of the constitution of the United States.

We find that the record reveals that narcotics agent Hughes testified that on December 12, 1961 he was advised that warrants had been issued for the arrest of Opal Cole and her brother, defendant LaFauncie Johnson, who both lived in Chicago, and that she operated a dress shop. Thereupon with the help of police officers, Hughes arrested Opal Cole at her shop and the group then went to her apartment which Hughes opened with a key supplied by her. Johnson was there alone and was arrested by Hughes. Incidental to his arrest a search was made which resulted in the finding by agent Doyle, who had recently arrived, of two address books (exhibits 8 and 9).

In *Harris* v. *United States,* 331 U.S. 145 (1947), the court said, at 150:

> "The Fourth Amendment has never been held to require that every valid search and seizure be effected under the authority of a search warrant. Search and seizure incident to lawful arrest is a practice of ancient origin and has long been an integral part of the law-enforcement procedures of the United States and of the individual states."

We hold that the facts in the case at bar bring it within the rule announced in *Harris.* Such address books are admissible in this case. *United States* v. *Owens,* 7 Cir., 346 F.2d 329, 332 (1965).

4. Defendant De Maro insists that at the trial evidence was received as to a sale of narcotics by defendant Carrioscia on October 29, 1963, which was after the indictment was returned and ordered suppressed until 11 P.M. Counsel for De Maro cites no controlling au-

thority to support his contention that the return of an indictment, particularly a suppressed indictment, terminates a conspiracy and therefore ends the vicarious responsibility of the conspirators. We find it immaterial that some defendants named in an indictment which had been returned continued to carry on their business as usual after its return. With regard to those defendants the conspiracy was not terminated until their arrests.

As the court said *United States* v. *Cohen*, 2 Cir., 145 F.2d 82, 89 (1944), cert. denied 323 U.S. 799:

> "* * * So too as to declarations of the various confederates. In accordance with the well-settled rule these were all admissible while the 'scheme' was in process of realization, provided they were in furtherance of it. Nor would it make any difference that they were after the indictment was found, if the 'scheme' had not yet ended; because, while of course the crime must be complete in all its elements before indictment found, there may be evidence thereafter which tends to prove its past existence. * * *"

5. Defendant Passini contends that his rights under the sixth amendment of the United States constitution were violated by the court's denial of his motion for a severance or continuance.

The record shows that Passini assured the court that he agreed that Mr. Lewis, his attorney, might be excused and that attorney McDonnell, during his absence, would represent Passini. The court was later advised that attorney Lewis had been taken to a hospital for treatment and Passini agreed to continue with Mr. McDonnell. Thereafter the court granted leave to Passini to act as co-counsel for himself. Thereafter Passini asked for a continuance or a separate trial. After extended colloquy

between the court, Passini and counsel, the court designated attorney McDonnell to represent Passini and that representation was refused. This did not satisfy Passini, who wanted his own lawyer and was willing to wait for the return of Mr. Lewis after his illness was over. Finally the court instructed Passini to be seated and proceed to represent himself. After further spirited colloquy between Passini and the court, Passini agreed that McDonnell would represent him for the balance of that day.

Discussions between McDonnell and Passini occurred thereafter but were fruitless in satisfying Passini.

In calling our attention to certain testimony, the government has pointed out that on

> "September 16, 1963, when Battiato, De Maro and Passini were concerned about a strange car parked in the neighborhood during a transfer of heroin to Carrioscia, it was Passini who suggested that Carrioscia be contacted. * * * Passini's name was not mentioned from the witness stand by any witness during the time Mr. Lewis was absent from the courtroom."

and that Passini was in no way prejudiced by the absence of his counsel.

We hold that the court committed no error in handling this difficult situation. We further hold that no statements made by the court were prejudicial to Passini and that he was not denied a fair trial.

6. Counsel for Charles Cole argue that count 39 of the indictment does not allege his commission of an offense as required by the sixth amendment of the constitution of the United States. The basis for the conviction of Cole for violation of Title 18 U.S.C. § 1403 under that count is the testimony of Mildren McLean that, in accordance with Cole's telephone call to her in early 1960, she went

to a location mentioned by him and met "Mickey" Carrioscia and received a package of heroin. Similar conversations occurred between them in April and August, 1960. Count 39 also incorporates Title 21, U.S.C. § 174, which prohibits unlawful trafficking in narcotics, already reflected in this opinion. This attack on count 39 must fail.

Moreover, the district court did not commit error in denying Cole's motion for a bill of particulars.

7. To avoid an unnecessary protraction of this opinion, we state that, to the extent that any one of the numerous points raised by defendants herein has not been specifically dealt with in this opinion, we conclude that none of said points finds support either in the record or in the law applicable thereto.

Accordingly the judgment from which these appeals were taken is affirmed.

JUDGMENT AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

Order entered by Court of Appeals for the Seventh Circuit on September 15, 1966, SCHNACKENBERG, KNOCH and KILEY, JJ: (Caption omitted)

It is ordered by the Court, that the Petition for a rehearing of this cause, filed by defendant-appellant Angelo Passini herein, be and the same is hereby denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 682

ANGELO PASSINI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 701

CHARLES COLE, JESSE COWAN AND AMERICO DE PIETTO, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 975 Misc.

MIKE DE MARO

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 365 F. 2d 57.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1966. Petitions for rehearing on behalf of petitioners Passini and De Maro were denied on September 15, 1966. A petition for rehearing on behalf of petitioners Cole, Cowan and De Pietto was denied on September 19, 1966. Passini's petition for a writ of certiorari (No. 682) was filed on October 14, 1966; and the petition of Cole, Cowan and De Pietto (No. 701) was filed on October 19, 1966. Mr. Justice Clark extended petitioner De Maro's time for filing to November 14, and his petition (No. 975 Misc.) was filed on November 7, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioner Passini (No. 682) presents the following questions:

1. Whether the evidence was sufficient to support his conviction.

2. Whether he was denied the effective assistance of counsel.

All petitioners, except Passini, raise the following two questions:

3. Whether the failure of the trial judge to turn over to the defense minutes of the grand jury testimony of one witness required reversal of their convictions.

4. Whether it was error for the trial court to admit evidence of the flight of a co-conspirator.

In addition, the petition in No. 701 raises the following questions:

5. Whether the trial court properly admitted evidence seized incident to an arrest of a co-defendant.

6. Whether count thirty-nine of the indictment (against Cole alone) was insufficient as matter of law.

STATUTES INVOLVED

21 U.S.C. 174 provides in part:

> Whoever fraudulently or knowingly imports or brings into the United States or any territory under its control * * * or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of any such narcotic drug * * * or conspires to commit any of such acts * * * shall be imprisoned not less than five or more than twenty years * * *.

18 U.S.C. 1403 provides in part:

> Whoever uses any communication facility in committing or in causing or facilitating the commission of, or in attempting to commit, any act or acts constituting an offense or a conspiracy to commit an offense the penalty for which is provided in * * * (21 U.S.C. sec. 174) * * * shall be imprisoned not less than two and not more than five years * * *.

STATEMENT

The five petitioners and eleven other defendants were convicted in the United States District Court for the Northern District of Illinois of importing and sell-

ing narcotics, and conspiring to do so, in violation of 21 U.S.C. 174. In addition, petitioner Cole was convicted of using a telephone in facilitating the sale of narcotics, in violation of 18 U.S.C. 1403. On June 29, 1964, petitioners Cole, De Maro, and De Pietto were sentenced to imprisonment for twenty years, petitioner Cowan for ten years, and petitioner Passini for five years. The court of appeals affirmed the convictions.

The evidence established that the defendants were members of a conspiracy trafficking in narcotics, which operated on three levels—suppliers, distributors and salesmen. Petitioners De Pietto and De Maro were suppliers, and petitioners Cole and Cowan were distributors. None of these petitioners questions the sufficiency of the evidence against him.

Petitioner Passini, who does attack the sufficiency of the evidence to convict him, was shown to have engaged in the following activities: On August 22, 1961, Barbara Mitchell and Opal (Pat) Cole drove to the parking lot of a Chicago motel. Passini, whom Barbara Mitchell did not see approach, entered the rear seat of the automobile (Tr. 2633–2637), received $5,000 from Opal Cole in return for a package, and commented that "the stuff was so strong he had to put on a mask while mixing and had to turn the fan on" (Tr. 2428–2430).[1] After the money was passed, Barbara Mitchell turned around in the front seat and looked at Passini. After some discussion of the narcotics busi-

[1] "Tr." designates the Transcript of Trial Proceedings (which we are lodging with the Clerk of this Court) and "J.A." designates petitioners' Joint Appendix.

ness, Passini left the car. Barbara Mitchell observed Passini taking just a few steps away from and to the rear of the vehicle (Tr. 2640–2642).

On September 16, 1963, Frank Carrioscia told Sparkman (a government informer) that he would have narcotics for him later on in the evening. At about 9:00 that evening Carrioscia, Joe Battiato and petitioner Passini met in Andy's Grill. Shortly afterwards, Battiato and Carrioscia left the grill, and Battiato gave Carrioscia a brown paper bag. Carrioscia then proceeded to meet Sparkman and gave him the brown paper bag, which contained heroin (Tr. 3682–3695). In the meantime, Battiato returned to Passini in Andy's Grill, and the following conversation was overheard by an agent seated at a nearby table (Tr. 4211–4213, 4439):

> BATTIATO. We are in trouble.
>
> PASSINI. What is wrong?
>
> BATTIATO. There is a white Caddy convertible sitting over by the meet spot. That is the second time I saw it. It pulled right out behind Frank.
>
> PASSINI. Maybe we ought to call Frank?
>
> DE MARO. No, Frank hasn't had time to get back to the west side yet. We will go over there.

On September 27, 1963, Passini was observed walking towards defendant Joe Battiato's residence, carrying a brown paper package under his arm (Tr. 3845). Battiato met Passini, and they both entered the apartment building. A few minutes later, Battiato left the building and gave Frank Carrioscia the package (Tr. 3845–3846). Passini went to Andy's Grill at

about 8:45 p.m., where an agent seated in the bar heard the following conversation between Passini, Ted De Rose and Mike De Maro (R. 3950):

PASSINI. Frank only showed up with a thousand.

DE ROSE. What about the other three hundred?

PASSINI. Frank will be here in a few minutes, Mike. You can talk to him yourself.

At about 9:45 that evening, Frank Carrioscia met Mike De Maro and Joe Battiato, and gave De Maro a stack of bills, saying, "Here's the grand." (Tr. 3706–3708). Later that evening, Carrioscia transferred heroin to the informer, Sparkman (Tr. 3711–3714).

ARGUMENT

1. Petitioner Passini contends that there was insufficient evidence to sustain his conviction on the conspiracy count, alleging that the witness Barbara Mitchell was mistaken in her identification of him as the person who received $5000 from Opal Cole and that agent Aruslan was mistaken in identifying him as the person, carrying a brown paper bag, who met Battiato on September 27 (No. 682, Pet. 18, 34–35, 36).[2]

[2] Agent Aruslan's testimony is reported as follows (J.A. 267; Tr. 3845): "A few minutes after that Battiato came back out, stood in front, smoked a cigarette and walked up and down. Several minutes later Angelo Passini walked west toward Battiato's residence. *Ted DeRose* was walking with a noticeable limp and he was carrying a brown paper package under his left arm. Angelo Passini met Battiato in the front of the building and they both entered." [Emphasis added.]

It is apparent from the context that the reference to "Ted DeRose", instead of "Angelo Passini" was either a slip of

These issues of credibility, resolved unfavorably to Passini by the jury, present no question warranting review. *Cramer* v. *United States,* 325 U.S. 1. Although there was no direct proof of an "agreement" to distribute narcotics, the agreement can be inferred from circumstantial evidence. *Krulewitch* v. *United States,* 336 U.S. 440. Considering all the activities of petitioner, the jury could properly conclude beyond a reasonable doubt that Passini conspired to traffic in narcotics.

2. Passini was represented at trial by attorney Melvin B. Lewis. Prior to the impanelling of the jury, Passini moved the court that he be allowed to represent himself together with his attorney. The trial court granted the motion, advising that Passini was to act with the same decorum as the attorneys present in the courtroom (J.A. 4). On the seventh day of the trial (which lasted a period of seven weeks) Mr. Lewis felt ill and asked the court if he might be temporarily excused. After the trial court was advised that another attorney, Mr. McDonnell, would continue Passini's defense with Passini's consent, Mr. Lewis was excused (Tr. 490–491). It was

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the tongue or a reporter's error. On cross-examination by Passini's counsel, Aruslan stated that he could distinguish between Passini and De Rose—Passini had a limp, De Rose had a peculiar walk (Tr. 3884). In another answer (which was subsequently stricken as not being responsive to the question put), Aruslan stated, "That was Angelo Passini walking west on south side of Belden, with—I stated with a noticeable limp, carrying a brown paper bag under his left arm, meet Joe Battiato in front of his apartment building, and both entered" (Tr. 3938–3939).

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thereafter determined that Mr. Lewis had suffered a mild heart attack, and that he would be hospitalized for an undetermined time (Tr. 541). With the consent of Passini, Mr. McDonnell continued representation of Passini through the rest of the proceedings of that day (Tr. 545). The following day, the uncertainty of the length of Mr. Lewis' stay in the hospital was again reported to the court (Tr. 691). Passini's motion for a continuance or severance was denied. He refused to accept the services of any of the attorneys present in the courtroom representing other defendants (Tr. 694–697), but again consented to representation by McDonnell for the remainder of that day (Tr. 702–703). The following day, another motion by Passini for continuance was denied, and Passini refused the appointment of any attorneys present in the courtroom (Tr. 921–923). The court then released Mr. McDonnell, of whose services Passini disapproved, from further representation (Tr. 923). The government moved the court for a short continuance in order to obtain the services of an independent attorney for Passini. Passini refused the offer, stating that he would accept only Mr. Lewis as his attorney (Tr. 945–948). Several other motions for a continuance were denied, and the court directed another attorney, Mr. Devine, to protect Passini's interest, whether or not Passini agreed (Tr. 976–977). Mr. Lewis returned six trial days after he was taken ill (Tr. 1829–1830).

During Mr. Lewis' absence, no evidence was introduced that implicated petitioner Passini, who was charged only in the conspiracy count. The testimony

relating to Passini was given by Barbara Mitchell, and agents Valentine, Aruslan, Jackson and Patch. Mr. Lewis either cross-examined, or had the opportunity to cross-examine, each of these witnesses.

Petitioner does not, and cannot, show that he was prejudiced by Mr. Lewis' absence. Rather he contends that absence of counsel *ipso facto* requires reversal. It is evident, however, that petitioner was not really deprived of counsel but sought to use the temporary illness of his attorney as a means of escaping trial. The trial court properly protected Passini's interests in this situation and did not abuse its discretion in refusing to grant a continuance. *United States* v. *Bentvena,* 319 F. 2d 916 (C.A. 2); *United States* v. *Dardi,* 330 F. 2d 316 (C.A. 2); *Danziger* v. *United States,* 161 F. 2d 299 (C.A. 9), certiorari denied, 332 U.S. 769.

3. Petitioners, other than Passini, contend that it was reversible error to refuse to turn over to the defense certain grand jury testimony of the witness Beulah Greenlaw. On direct examination, the testimony of Mrs. Greenlaw implicated several of the original co-defendants as dealers in narcotics. Of the parties before this Court, however, only petitioners Cole and De Maro were mentioned. The witness testified that in July or August, 1960, at the direction of Opal Cole, she carried money in a brown paper bag to petitioner Cole, "because he was the big man" (Tr. 203). About three days later, she was sent on a similar mission, again giving money to petitioner Cole in a brown paper bag (Tr. 204–205). She further testified that on three occasions during the month of Au-

gust 1963, she received heroin from petitioner De Maro (Tr. 206–218).

Upon completion of the witness' testimony on direct examination, the following colloquy occurred between counsel and the court (Tr. 227–232):

> Mr. McDonnell. * * *
>
> If this witness has testified before a grand jury, I believe the defense is entitled to any minutes or notes taken during the course of her testimony before said grand jury.
>
> The Court. On what basis?
>
> Mr. McDonnell. Judge, I think there will be conflicting statements between anything which she stated before the grand jury and she has presently told this court and jury.
>
> Mr. Bailey. On what basis?
>
> Mr. McDonnell. On the basis of my investigation of this entire matter, Judge.
>
> Mr. Bailey. There is no basis in the record for that.
>
> Mr. McDonnell. Well, I am advising the court. I am certainly entitled to the minutes of the grand jury. If I am representing to the court that my investigation reveals something diametrically opposed to what this witness has testified to, am I not entitled to inquire to see if she gave the same story previously to this under oath? After all, Judge, she is testifying to something which occurred four years previous to this date.
>
> * * * * * *
>
> Mr. Bailey. I will represent to the court at this time that the witness has testified before a federal grand jury. * * *

> Mr. McDONNELL. There is no way I can tell if there is any inconsistency between the grand jury testimony of the witness and that which she might have testified to here.
>
> The COURT. Mr. Bailey has announced the correct procedure under the cases. First, it would have to be examined by me to determine.
>
> Mr. McDONNELL. Well, then, I request the court to examine them.

After an *in camera* inspection of the grand jury minutes, the trial court denied the motion for production, noting in passing that there was no material discrepancy between the witness' testimony at trial and that before the grand jury (Tr. 913–914).

Contrary to petitioners' contention, *Dennis* v. *United States*, 384 U.S. 855, does not require automatic production of grand jury minutes without a showing of "particularized need" as required by *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395. This Court carefully pointed out in *Dennis* that the trial judge retains the function of "* * * deciding whether a case has been made for production * * *" (384 U.S. at 875). In this case, as clearly reflected in the above colloquy, defense counsel merely hoped that there would be useful information in the grand jury minutes, and did not show any "particularized need" which outweighed the policy of secrecy of the grand jury minutes.

Witness Greenlaw's testimony in no way related to the conduct of petitioners Cowan and De Pietto, and her testimony concerned only two transactions with petitioner Cole and three transactions with petitioner De Maro. One of the transactions with Cole was

corroborated by her husband, Robert Greenlaw (Tr. 1006–1009), as was one of the transactions with De Maro (Tr. 1010–1011). The slight discrepancy of dates between the testimony of Beulah Greenlaw and the corroborating testimony of her husband does not of itself entitle petitioners to discovery of the grand jury minutes, especially where there was no material discrepancy between the substance of the described transactions.[3] Moreover, the testimony of Beulah Greenlaw was by no means critical to the government's case. The record is replete with similar testimony showing petitioners Cole and De Maro to be involved in a conspiracy to traffic in narcotics (*e.g.*, Tr. 479–480, 934–943, 1124–1126, 1152–1153, 2395–2398, 2403–2404, 2415–2419, 2435–2437; 3706–3708, 3993–4000, 4073–4074). Under these circumstances, the failure of the trial judge to turn over the grand jury minutes did not constitute reversible error. Compare *Dennis* v. *United States, supra,* at 872–873.

4. On October 25, 1963, at about 9 p.m., a federal agent saw Joe Battiato drive up to his residence with one Nolan Mack, go to his apartment and return and give a brown paper bag to Mack, who then drove off (Tr. 3855–3856.)

At approximately 9:20 p.m., agent Ruhl, who had sttationed himself near Mack's residence, observed Mack

---

[3] Beulah Greenlaw testified that she dealt with Charles Cole in the middle of July, 1960, and with Mike De Maro in the early part of August, 1963. Her husband testified that she met Cole in August, 1960, and that she met De Maro in the late part of August, 1963.

drive by. When Mack spotted agent Ruhl, he accelerated his vehicle, and Ruhl gave chase. Midway through a high-speed chase, Ruhl observed Mack shake a white powder out the car window and throw an unidentified object from the car. Eventually, Mack halted his vehicle. After Ruhl identified himself and advised Mack that he was under arrest, a gun battle ensued, in which Mack was fatally wounded (J.A. 324–327). Approximately five minutes later, agent Halpen arrived and, after attending to agent Ruhl, who also had been seriously wounded, examined Mack's vehicle. A white powder found on the arm of the door and on the floor was later identified as heroin (J.A. 280).

The only question concerning the admissibility of this testimony is one of relevancy. Whether the conspiracy had terminated, as suggested by petitioners, need not be determined, since *acts* of a co-conspirator, which are relevant to the proof of the conspiracy, are admissible against all conspirators, even though the conspiracy has ended. *Lutwak* v. *United States,* 344 U.S. 604, 617–618. In the present case, testimony relating to the chase and capture of Nolan Mack was clearly relevant to proof of the conspiracy. Evidence showed that Battiato, a co-conspirator, had given Mack a paper bag, the contents of which were unknown. When Mack was finally apprehended, heroin was found in his car, but there was no evidence of a paper bag. In order to account for the absence of the paper bag, and the possible chain of possession of the heroin from Battiato to Mack, testimony that an object was thrown from the vehicle by Mack was

clearly relevant. It was within the discretion of the trial court to conclude that the relevancy of such evidence outweighed any possible prejudice that might result from its admission. *Hardy* v. *United States*, 335 F. 2d 288 (C.A.D.C.).

5. During the latter months of 1961, federal narcotics agent Dayle coordinated his investigative activities through two government informers, Aubrey Gibson and Houston Garner. Through them, Dayle learned that Opal Cole and her brother LaFauncie Johnson, who both used an apartment at 8213 South Cottage Grove, were distributors of heroin (*e.g.*, Tr. 514–517, 526–527, 549–551, 555–563, 566–570).

On December 12, 1961, after Dayle had gathered this information, an indictment was filed against Opal Cole and LaFauncie Johnson, *inter alia*, charging several narcotics violations (Tr. 688, 706). On that same day, Dayle was informed that bench warrants had issued for the arrest of Cole and Johnson (Tr. 706), and he directed agent Hughes to proceed to 8213 South Cottage Grove to effect their arrests (Tr. 717). Hughes arrested Opal Cole at her dress shop, which is located approximately four lots away from her residence (Tr. 719). After conducting a search of the dress shop, Hughes, some local officers, and Opal Cole continued to 8213 South Cottage Grove to effect the arrest of LaFauncie Johnson (Tr. 719). Using Opal Cole's key to gain entrance to her apartment, Hughes arrested LaFauncie Johnson, who was found in the living room (Tr. 720–721). The apartment was then searched, and an address book, which contained the

name of petitioner De Maro, was found in the top drawer of a bureau in a bedroom (Tr. 723).

The trial court denied a motion to suppress the address book, filed by Opal Cole and joined in by the others, on the ground that the search was proper as incident to the arrest of LaFauncie Johnson (Tr. 762). The court of appeals affirmed that ruling.

Although neither Opal Cole nor Johnson is before this Court,[4] petitioners in No. 701 contend that the address book was improperly admitted in evidence. As the courts below held, however, the seizure was proper under well established principles. When agent Hughes arrived at the apartment and arrested LaFauncie Johnson pursuant to the warrant, he was well informed that both Cole and Johnson were in the business of distributing narcotics. It was therefore reasonable for him to search the apartment, occupied by Opal Cole and Johnson, incident to the arrest of Johnson. *United States* v. *Rabinowitz*, 339 U.S. 56; *Harris* v. *United States*, 331 U.S. 145. The address book found in the search identified another member of the conspiracy, Mike De Maro, who was Opal Cole's supplier. Since Opal Cole was in the business of distributing narcotics, this address book indicating the address of other business connections was properly seized as part of the equipment used to commit the offense of distributing narcotics. *Marron* v. *United States*, 275 U.S. 192, 199; *Abel* v. *United States*, 362 U.S. 217, 237.

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[4] At the time of the search of the apartment, petitioner Charles Cole was divorced from Opal Cole, and he had no interest in the searched apartment (Tr. 2693-2695, 4979-4980).

In any event, the address book only served to establish that there was some relationship between De Maro and Opal Cole, and was cumulative to other testimony that Opal Cole kept De Maro's name in an address book (Tr. 2407).

6. Petitioner Cole's attack on the sufficiency of count 39 of the indictment, in which he alone was named, need not be considered, since his conviction on the conspiracy count alone will support the general sentence imposed. *Claasen* v. *United States,* 142 U.S. 140; *Barenblatt* v. *United States,* 360 U.S. 109, 115.

In any event, the count sufficiently alleged an offense under 18 U.S.C. 1403. It charged as follows (J.A. 31):

> During or about the month of August, 1960, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, and within the jurisdiction of this Court, the defendant, CHARLES COLE, used a communication facility, to wit, a telephone in committing and in causing and facilitating the commission of, and in attempting to commit, an offense, the penalty for which is provided in Title 21, Section 174, United States Code, in violation of Title 18, Section 1403, United States Code.

The indictment thus informed petitioner that he was charged with using the telephone to facilitate narcotics transactions in Chicago in August, 1960. The fact that it did not specify the particular aspect of 21 U.S.C. 174 which was violated is unimportant, since the use of the telephone to assist any violation of 21 U.S.C. 174 falls within the interdiction of 18 U.S.C. 1403. There is no showing that petitioner was

prejudiced in his defense by the failure of the indictment to specify more exactly the date of the call or to whom the telephone call was made. To the extent that the indictment was broader than it had to be,[5] petitioner was benefitted, from the standpoint of protection against double jeopardy, for he could not again be prosecuted for any telephone calls in aid of narcotics transactions to anyone during the whole period covered by the indictment.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petitions for writs of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
LAWRENCE P. COHEN,
Attorneys.

DECEMBER 1966.

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[5] One Mildred McLean testified that, in August 1960, petitioner Cole telephoned her, in connection with a narcotics transaction, and told her "to tell Virge to hurry up with the money, because people was (sic) breathing down his neck" (Tr. 1160).

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No. 682

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

ANGELO PASSINI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF

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May it please the Court:

The government has offered a casual answer to the petition of Angelo Passini. This reply is not prompted by the need to rebut the government's assertions. Rather, it is the product of our belief that a diminution of basic rights, of the magnitude here involved, should, if it is to occur at all, be the product of something more than a shrug.

Accordingly, we think it appropriate to remind your Honors what the government did *not* say in its answer to our Petition.

I.

AS TO THE DENIAL OF THE RIGHT TO COUNSEL

It is to be noted that the government does not submit one word, in response to our complaint concerning the trial court's treatment of the defendant in his counsel's absence (Cf. Petition pp. 22-27). The removal of the petitioner to a place where he was unable to hear the testimony; the threats and denigration; the statement that his bail would be revoked unless he refrained from further motions; the conflicting directions and confusing caveats directed at him—no attempt is made to justify these. They are beyond justification. It is to the government's credit, that no excuse is offered.

Rather, the government contends that Petitioner was not prejudiced because "(d)uring Mr. Lewis' absence, no evidence was introduced that implicated petitioner Passini. . . ."

But as we pointed out (Petition p. 29), evidence was offered which, properly exploited, would have helped him greatly.

And very certainly, the presence of counsel would have prevented the trial court's bludgeonings which held Petitioner up to ridicule and obloquy in the eyes of the jury.

The government complains (G. Br. 9) that Petitioner has suggested ". . . that absence of counsel *ipso facto* requires reversal." Petitioner is not required, on the state of the record here, to advance that proposition. Of course, in order to affirm, the government's statement of that issue must be answered in the negative. But Petitioner is, we believe, entitled to reversal on much more narrow grounds,

if need be: Whatever may be the minimum standard for treatment of a defendant deprived of counsel, those standards were violated here.

If it were necessary, we should not hesitate to state that a defendant's trial can never proceed in the absence of his counsel, where the defendant is without fault in the matter. We regard the language of the Sixth Amendment as unequivocal. Equally unequivocal, have been the prior expressions of this and other Courts, a few of which were cited in our Petition.

Action by this Court is required here if the law, in this area, is not to become a hopeless jumble of contradiction. We do not envy the job of the scholar faced with the task of reconciling the opinion below with this Court's decisions in *Massiah, Escobedo,* and *Miranda.* Ultimately, the rule which that scholar must derive from his comparison, is this:

> "The right to counsel, on demand, is absolute *before* trial. At trial, it is conditional."

• • •

In an attempt to justify that "rule", the government cites to your Honors, three cases from lower Courts.

None of these cases support the government's position here. One of them, *Danziger* v. *United States,* 9 Cir. 1947, 161 F.2d 299, has nothing to do with the case at bar. In *Danziger,* no trial proceedings were held in the absence of counsel; the only question involved in that case, related to a possible conflict of interest. 161 F. 2d 301.

United States v. *Dardi,* 2 Cir. 1964, 330 F. 2d 316, likewise did not involve any proceedings in the absence of counsel. In *Dardi,* one defendant retained counsel whom he

knew to be in questionable health. Prior to trial, that counsel moved for a postponement of "at least a month and a half to two months." The motion was denied, and other counsel assigned, who saw the trial through from start to finish. Original counsel was available for consultation. The issue presented, related only to the question of possible conflict of interest. The trial court stated that if a conflict arose, appropriate precautions would be taken. No conflict arose. Accordingly, no error was found. (330 F. 2d 335) Those facts are a far cry from the present case.

The government's final citation is to *United States* v. *Bentvena*, 2 Cir. 1963, 319 F. 2d 916. In *Bentvena*, the absence of counsel resulted from "manipulations" on the part of the defense. (319 F. 2d 937) It was a part of a pattern of disruption which culminated in unruliness so pronounced as to require the gagging and shackling of defendants, to preserve the security of the courtroom (319 F. 2d 930). The Court in *Bentvena* takes special note of the suspicious nature of the occasions for the absence of counsel in that case, (319 F. 2d 937), but cautions that where a defendant ". . . is able to obtain counsel for himself, he must be given a reasonable time and a fair opportunity to secure counsel of his own choosing." 319 F. 2d 936.

Bentvena is a completely unique situation, and certainly does not authorize proceeding in the absence of counsel, with no opportunity to obtain new counsel, where the defendant is without fault with respect to counsel's absence. Petitioner engaged in no "manipulations", no misconduct, no impropriety. Those very factors were deemed determinative in *Bentvena*.

II.

THE SUFFICIENCY OF THE EVIDENCE

In our Petition, we fully discussed each item of evidence against Petitioner. We pointed out that from a consideration of the government's case alone—both direct and cross examination—there was no basis for Petitioner's conviction.

The government has answered, by extracting those portions of its own evidence which tend to support the conviction, and ignoring those portions which are inconsistent with the conviction.

Obviously, the right to cross-examination is meaningless if only the direct testimony is to count in determining guilt. Equally obviously, an oath to tell "the whole truth" is an empty form, if only those portions of the "truth" which support guilt are to be considered.

When all else fails, exculpatory evidence is deemed "either a slip of the tongue or a reporter's error." (G. Br. 6, 7). Even the transcript itself, apparently, is not sufficient basis for the impeachment of a verdict of guilty.

III.

THE PRODUCTION OF GRAND JURY MINUTES

The government has answered our Petition in a document which also embraces totally unrelated claims made by other petitioners arising from the same trial.

Such, apparently, is the ritualistic course of conspiracy prosecutions at all levels.

We believe that the government's handling of this matter, entitles us to comment on the issue of the production of grand jury minutes.

The government discusses the issue in terms of this Court's holding in *Dennis* v. *United States*, 384 U.S. 855, 16 L. Ed. 2d 973. The government views *Dennis* as preserving the requirement of "particularized need" for disclosure of grand jury minutes, and argues that the defense presented no showing of such need.

We think that argument misses the point entirely. The trial court was apparently satisfied by the showing of "particularized need." Accordingly, it examined the transcript *in camera*, and found no "*material* difference" in the testimony. (Tr. 914, emphasis added.)

This was precisely the procedure disapproved in *Dennis*. (16 L. Ed. 2d 986) The trial judge undertook to act as advocate for the defense, and then determined that there was no occasion for advocacy. That is not the proper function of a judge, as *Dennis* holds.

The trial judge saw a need sufficient to require examination of the transcript. Comparing the grand jury testimony with that given at the trial, he apparently found that there were "differences", but that they were not "material." We think a defendant is entitled to insist that the "materiality" of any such difference be determined by a procedure in which his lawyer participates, and that it be presented to the jury if his lawyer thinks it worth while. That, we believe, is what *Dennis* holds.

The significance of this issue to Petitioner Passini, is that the episode reflected the same reasoning which impelled the trial court's unwarranted and erroneous assumption that there was no conflict between his defense and that of De Maro. Needing advocacy, Petitioner received only judgment.

CONCLUSION.

Petitioner's points are simply not susceptible to the airy dismissal accorded them by the government. We pray for review. We believe that we do so, in a cause which merits that prayer.

Respectfully submitted,

MELVIN B. LEWIS,
FRANK W. OLIVER and
MITCHELL H. CAPLAN
Attorneys for Petitioner.

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Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

MIKE DE MARO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR REHEARING OF ORDER DENYING PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners pray that this Court grant rehearing of its orders of January 16, 1967 denying the Petitions for Writ

of Certiorari, and that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above entitled cause as prayed in the petitions filed herein on October 14, 19, November 7, 1966.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

SINCE THE FILING OF THE INSTANT PETITION FOR CERTIORARI, THE FOLLOWING HAS OCCURRED, WHICH WE RESPECTFULLY SUBMIT WARRANTS THE COURT'S RECONSIDERATION OF THE INSTANT PETITIONS:

A. In *Hayden* v. *Warden of Maryland Penitentiary,* 363 Fed. (2) 647, it was held that clothing seized from the defendant's home when he was arrested there shortly after the commission of a robbery were "of only evidentiary value," and not subject to a lawful seizure. Hayden is a principle authority relied upon in the instant petition for granting certiorari. Subsequent to the filing of the instant petition, this Court granted certiorari in *Hayden,* (11/7/66), 17 L.Ed. (2) 210, 87 S.Ct. 290, and *Hayden* is now pending before this Court for oral argument and decision. We respectfully submit that the instant petitions, where address books, "of only evidentiary value," were seized, and such seizure was held to be valid by the Seventh Circuit Court of Appeals, is the ideal companion case to *Hayden,* where seized clothing was held by the Fourth Circuit Court of Appeals to be "of only evidentiary value," and not subject to lawful seizure.

B. Nor had this Court decided, when the instant petitions were filed, *Lewis* v. *U.S.,* (12/12/66), 17 L.Ed. (2) 312, in which the Court stated, 17 L.Ed. (2) 312, p. 316, that *"an agent is (not) authorized to conduct a general search for incriminating materials. . ."*

C. At the time the instant petitions for writ of certiorari were filed, this Court had not decided *Hoffa* v. *United States* (12/12/66), 17 L.Ed.(2) 374, 87 S.Ct., in which Mr. Justice Stewart, expressing the views of the majority, stated, (17 L.Ed. (2) 374, 381-382) that, when a citizen, "puts something in his . . . desk drawer . . . he has the right to know it will be secure from an unreasonable search. . . *So it was that the Fourth Amendment could not tolerate the . . . purloining of the petitioner's private papers in Gouled,* (255 U.S. 298)."

D. Mr. Chief Justice Warren, Mr. Justice Fortas and Mr. Justice Brennan were of the opinion that the instant petitions for certiorari should be granted. The above quoted language in *Hoffa* of Mr. Justice Stewart, who did not dissent from the denial of the instant petitions, we submit, fortifies our position in the case at bar. So does the following expression from the dissenting opinion of Mr. Justice Douglas in *Osborn* v. *U.S.*, 17 L.Ed. (2) 394, P. 411, decided December 12, 1966, also after the instant petitions were filed. Mr. Justice Douglas, after quoting from *Boyd* v. *U.S.*, 116 U.S. 616, 29 L.Ed. 746, P. 751, stated:

> *"Today a search that respects all the procedural proprieties of the Fourth Amendment is nonetheless unconstitutional if it is a 'search' for testimonial evidence."* (Italics ours)

Mr. Justice Douglas likewise did not dissent from the denial of the instant petitions for certiorari. The search for and seizure of the address books in the instant case extorted "testimonial evidence," compelled self-incrimination and violated the Fourth and Fifth Amendments. The holding of the Court of Appeals in the instant case is diametrically opposed to, inconsistent with, and repug-

nant to the foregoing expressions and holdings of *Hoffa, Osborn, Lewis* and *Hayden.*

E. Trial Courts are consistently expressing confusion and dubiousness as to this Court's holding in *Dennis* v. *United States,* 16 L.Ed. 2d 973 of a defendant's right to the production and examination of government trial witnesses' grand jury testimony. No ambiguity exists among these writers regarding the Court's holding in *Dennis.* Most assuredly, ambiguity was not the basis for the Second Circuit Court of Appeal's complete disregard of *Dennis* in *U.S.* v. *Ulman,* (decided October 27, 1966, published January 16, 1967,) 368 Fed. 2d 725, 730, after the filing of the instant petitions. Nor was ambiguity the basis for the Seventh Circuit Court of Appeals' failure to follow, distinguish, discuss or cite *Dennis* in the case at bar, a judicial breach, we submit, of extreme magnitude. Perhaps it was the Court of Appeals' ignoring *Dennis,* or the *Dennis* holding itself that induced the lapse of memory of three narcotics agents, as to whether they testified before the Grand Jury, in the trial of *U.S.* v. *Irving Napue,* 66 CR 41, in the United States District Court for the Northern District of Illinois, Eastern Division at Chicago, Illinois on November 28-29, 1963,[1] subsequent to the filing of the instant petitions. Although the Assistant U. S. Attorney informed the trial court that he could determine from the Grand Jury minutes and his office whether they did so testify, (App. A 175, 19, 25) defense counsel's motion that the Court order him to make such determination was overruled, (App. A, pp. 6, 17, 19, 30). The Court expressed a reluctance not to order production of the

[1] This portion of the certified transcript of said trial is submitted herewith as Appendix A. Attorney Pincham on the instant petition was also the Attorney for the defendant, Napue, on said trial.

Grand Jury testimony and suggested to the U. S. Attorney that production was feasible and practical (App. A 30-31). Nevertheless, the Court, in *Napue*, denied defense counsel's motion that the government witness' Grand Jury testimony be produced (App. A, 30). The trial judge was dubious of the defendant's right thereto. This ambiguity, we respectfully submit, should be here rectified and "at the earliest opportunity." *Mesarosh* v. *U.S.*, 1 L.Ed. (2) 1, 9.

F. Again, uncertainty of the *Dennis* holding was clearly expressed by the trial judge in *U.S.* v. *Segaviano, et al.*, No. 66 CR 371, in the U. S. District Court for the Northern District of Illinois, Eastern Division, on trial January 31-February 6, 1967.[2] First, the trial court accused defense counsel of intellectual dishonesty in his interpretation of the *Dennis* holding, (App. B 1-22). Second, the trial court interpreted the *Dennis* holding to be premised on (1) the lapse of time between the alleged offense and the witnesses' trial testimony; (2) that the witnesses were accomplices, rather than police officers; (3) that the charge was a conspiracy; (4) that the witnesses' trial testimony was of conversations with the defendants, rather than acts; and (5) the witnesses admitted some mistakes in their trial testimony (App. B, 15-17). Surely this Court did not intend to confer upon an accused a right premised upon such discriminate factors, none of which the accused could remotely control. And when defense counsel pointed out that none of the aforementioned factors existed in *Worthy* v. *U.S.*, 352 Fed. (2) 718, which this Court remanded, 16 L.Ed. (2)

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[2] This portion of the certified transcript of said proceedings is also submitted herewith as Appendix B. Attorney Pincham was also the defendant, Segaviano's Attorney on said trial.

1000, in the light of *Dennis*, (App. B, 19-20, 24-25), the trial court then agreed that defense counsel's interpretation of the *Dennis* holding was correct, (App. B, 40-42). But upon the Court ordering that the government witnesses' Grand Jury testimony be produced to defense counsel, (App. B, 46), the government objected on the basis of the trial court's subsequent holding in *National Dairy Products Co.* v. *U.S.*, 350 Fed. (2) 321, (App. B, 46-47), after remandment by this Court in the light of *Dennis*, 16 L.Ed. (2) 993. The trial court thereupon again reversed itself and denied defendant's motion for production, (App. B, 59), but subsequently granted it under unwarranted certain restrictions, the portion of which proceedings has not yet been transcribed.

It is respectfully submitted that the foregoing trial court proceedings and expressed ambiguity as to the *Dennis* holding, all of which occurred after the instant petitions for certiorari were filed, warrant this Court in reconsidering the order denying the instant petitions and in allowing the issuance of the writ. We importune this Court so to do. Apparently, clarification of *Dennis* is sorely needed for the benefit of trial courts as well as the Courts of Appeals for the Second and Seventh Circuit.

CONCLUSION

For the reasons set forth above and in the petitions for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

R. Eugene Pincham

Counsel for Petitioners

CERTIFICATE OF ATTORNEY

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

R. Eugene Pincham

Counsel for Petitioners